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No. 93-58

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JAN C. HARMS, *et al.*,
Petitioners,

v.

CAVENHAM FOREST INDUSTRIES INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Fifth Circuit err by interpreting respondents' employee benefit plan documents so as to avoid double recovery of severance benefits by petitioners?

II. Did the United States Court of Appeals for the Fifth Circuit abuse its discretion under ERISA § 502(g)(1) by denying petitioners' application for attorney's fees and costs relating to their appeal to the Fifth Circuit where the Court of Appeals found (1) that petitioners sought to benefit themselves rather than "all participants and beneficiaries of the instant plan," (2) that petitioners had not "resolved a significant legal question regarding ERISA," (3) that there was an "absence of any culpability or bad faith" on the part of the respondents, and (4) that there was a "closeness of the legal issues presented—with the concomitant near-equivalence of merit in the parties' positions"?

LIST OF PARTIES

Petitioners:

Jan C. Harms

Robert E. Heinz

Sue C. Magee

Timothy H. Rush

James T. Quitta

Eddie Welch

Respondents:

Cavenham Forest Industries Inc.

Cavenham Forest Industries Salaried Employees Involuntary Separation Salary Continuation Plan

Trustees of Cavenham Forest Industries Involuntary Separation Salary Continuation Plan

Cavenham Forest Industries Retirement Plan for Salaried Employees

Trustees of Cavenham Forest Industries Retirement Plan for Salaried Employees

Crown Zellerbach Corporation

Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan

Trustees of Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan

Crown Zellerbach Retirement Plan

Trustees of Crown Zellerbach Retirement Plan

James River Corporation of Virginia

James River Corporation of Nevada

James River II, Inc.:

Successor to James River Corporation of Nevada

James River Paper Company:

Successor to James River II, Inc.

Hanson Natural Resources Company:

A Delaware general partnership of which respondent Cavenham Forest Industries Inc. is a general partner

Gold Fields Mining Corporation:

A Delaware corporation and a general partner of Hanson Natural Resources Company

Cavenham Energy Resources Inc.:

A Delaware corporation and a general partner of Hanson Natural Resources Company

Hanson plc:

Indirect owner of Hanson Natural Resources Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. THE FIFTH CIRCUIT'S INTERPRETATION OF COMPLEX AND UNCOMMON PROVISIONS IN RESPONDENTS' EMPLOYEE BENEFIT PLANS SO AS TO AVOID DOUBLE RECOVERY OF SEVERANCE BENEFITS BY PETITIONERS DOES NOT WARRANT REVIEW BY THIS COURT	4
II. THE FIFTH CIRCUIT'S DECISION THAT AN AWARD OF ATTORNEY'S FEES AND COSTS RELATING TO PETITIONERS' APPEAL TO THE COURT OF APPEALS WAS "UNWARRANTED" WAS NOT AN ABUSE OF DISCRETION AND DOES NOT WARRANT REVIEW BY THIS COURT	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 8, 10
Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 7
Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978) 6
Freeman v. Continental Ins. Co., 996 F.2d 1116 (11th Cir. 1993) 7
Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986) 6
Jan Harms, et al. v. Cavenham Forest Industries Inc., et al., No. 87-4068, slip op. (E.D. La. 1993) .. 9
Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980) 3, 7
Jacobs v. Pickands Mather & Co., 933 F.2d 652 (8th Cir. 1991) 7
Lucas v. Teamsters Local 639 Pension Trust, 2 Employee Benefits Cas. (BNA) 1998 (D.D.C. 1981) 7
McConnell v. MEBA Medical & Benefits Plan, 778 F.2d 521 (9th Cir. 1985) 7
McGee v. Equicor-Equitable HCA Corp., 953 F.2d 1192 (10th Cir. 1992) 7
Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan, 698 F.2d 593 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983) 6
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 8, 9
Production & Maintenance Employees' Local 504 v. Roadmaster Corp., 954 F.2d 1397 (7th Cir. 1992) 7
Quesinberry v. Life Ins. Co. of N. America, 987 F.2d 1017 (4th Cir. 1993) 7
Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983) 6

STATUTES

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ..... 7, 8, 9

TABLE OF AUTHORITIES—Continued

Page

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 *et seq.* 7, 8

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ..... *passim*

Section 502(g)(1), 29 U.S.C. § 1132(g)(1) 4, 6

LEGISLATIVE MATERIALS

S. Rep. No. 1011, 94th Cong., 2d Sess. 4 8

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. The points and arguments raised by the petition treat this Court as if it were one of errors and appeals rather than one which conserves its limited resources for significant issues. Petitioners ask this Court to "second-guess" the Fifth Circuit's interpretation of respondents' employee benefit plan documents in an effort to obtain "double-recovery windfall" severance benefits. They also ask this Court to "second-guess" the Fifth Circuit's exercise of discretion in denying petitioners' application for attorney's fees and costs. The issues in this case do not present important issues of unsettled law that should be decided by the Court.

COUNTERSTATEMENT OF THE CASE

As part of its efforts to stave off an involuntary takeover, the management of Crown Zellerbach Company ("Crown") caused certain of its employee benefit plans to be amended effective April 1, 1985 so as to provide for enhanced benefits in the event of such a takeover. Despite its efforts, a change in control of Crown occurred in July, 1985. Thereafter, as part of corporate restructuring, the responsibility for benefits in question was transferred to, and was assumed by, plans of a new corporation, Cavenham Forest Industries Inc. ("Cavenham").

The benefits at issue in this case, as found by the Court below, are severance benefits and enhanced retirement benefits. Each of the six petitioners has received severance benefits from Cavenham in amounts ranging from $22,650.00 to $96,933.00. In this action, they seek equivalent amounts of severance benefits from Crown, with respect to the same prior service. Petitioners candidly admit they seek double recovery: "[w]hat the beneficiaries seek, as they forthrightly conceded at oral argument, is merely a double-recovery windfall—a result abhorred by ERISA." Pet. App. at A-32.[1] Both the District Court and the Court of Appeals rejected petitioners' arguments to interpret the plan documents so as to entitle petitioners to "a double-recovery windfall by way of collecting severance payments from both plans." Pet. App. at A-18.

Regarding enhanced retirement benefits, both the District Court and the Court of Appeals concluded that petitioners were entitled to those benefits. The entitlement of petitioners to the enhanced retirement benefits is not an issue before this Court.

Petitioners applied to the Court of Appeals for attorney's fees and costs relating to their appeal to the Fifth

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[1] Citations to the appendix submitted with the petition are referred to as "Pet. App. at ——."

Circuit. (Petitioners' application for attorney's fees and costs relating to the proceedings in the District Court was denied by the District Court on July 6, 1993, *i.e.*, after the petition for certiorari was filed, and is not an issue before this Court).[2] Here, the Court of Appeals exercised its discretion by declining to award costs and attorney's fees in connection with the appeal to that Court. The Court of Appeals did so in the context of its findings (1) that petitioners sought to benefit themselves rather than "all participants and beneficiaries of the instant plan," (2) that petitioners had not "resolved a significant legal question regarding ERISA," (3) that there was an "absence of any culpability or bad faith" on the part of the respondents, and (4) that there was a "closeness of the legal issues presented—with the concomitant near-equivalence of merit in the parties' positions."[3] Pet. App. at A-35 and A-36.

REASONS FOR DENYING THE WRIT

The Fifth Circuit's decision does not present any question that warrants review by this Court. This is a routine case involving the interpretation of complex and uncommon language in the respondents' employee benefit plans. Even though petitioners' appeal to the Fifth Circuit did not achieve a change in the District Court's judgment, petitioners suggest that the Fifth Circuit abused its discretion because that Court found that an award to petitioners of attorney's fees was "unwarranted." Notwithstanding petitioners' assertions to the contrary, there is no conflict among the courts of appeals as to the basic elements to be considered in the exercise of discretion regarding the

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[2] *See* Appendix, *infra*, at 1a.

[3] The Court of Appeals also noted that "[g]iven the lack of any bad faith or culpability in the defendants' prosecution of this case, we find the deterrent purpose that the third *Bowen* factor purports to serve to be inapplicable to our analysis." Pet. App. at A-36, n. 12 and A-42, n. 3. The "third *Bowen* factor" refers to the five-factor test as adopted in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980).

award of attorney's fees under § 502(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(g)(1). The petition therefore should be denied.

I. THE FIFTH CIRCUIT'S INTERPRETATION OF COMPLEX AND UNCOMMON PROVISIONS IN RESPONDENTS' EMPLOYEE BENEFIT PLANS SO AS TO AVOID DOUBLE RECOVERY OF SEVERANCE BENEFITS BY PETITIONERS DOES NOT WARRANT REVIEW BY THIS COURT

The underlying dispute between the parties is the interpretation of certain language in the respondents' employee benefit plan documents. The plan terms in dispute were part of the effort of Crown Zellerbach to fend off an involuntary takeover. The plan provisions provided that upon a "change of control," eligible salaried employees would be entitled to special severance benefits and to special enhanced retirement benefits.

The change of control occurred nevertheless and, as part of the subsequent corporate restructuring, Crown Zellerbach's timber and wood products division was transferred to Cavenham Forest Industries Inc. The six petitioners were among the employees who accepted employment with Cavenham. By agreement with Crown, Cavenham assumed responsibility for all benefits to which petitioners and others were entitled. When the six petitioners' employment with Cavenham was terminated, they received the special severance benefits under the change of control plan provisions. However, they sought to collect duplicate severance benefits from Crown and that is the only remaining claim for benefits by the six petitioners.[4]

The change of control plan provisions were drafted with the particular purpose of assisting the efforts of

[4] There was a question as to the entitlement of the petitioners to enhanced retirement benefits, but the courts below have decided that issue in favor of the petitioners and that issue is no longer in contention.

Crown to resist an involuntary takeover. If this Court were to review the plan document interpretation issues presented by petitioners, the Court's efforts would not likely have impact beyond this case because the interpretive issues in this case are so case-specific. The language involved is not language appearing in most employee benefit plans. As noted, it is custom-drafted language that was intended as a defensive measure against an impending corporate takeover attempt.

The resolution of the interpretive issues dealt with by the courts below does not call for further review by this Court. Such plan interpretive issues do not warrant review by this Court generally. *A fortiori*, this is true where the particular plan language is unusual.

The six petitioners have received their generous change of control severance benefits in full. Both the District Court and the Court of Appeals have interpreted the respondents' plans on their merits and have both concluded that the six petitioners are entitled to be paid severance benefits only once with respect to the same employment period. There is no reasonable basis for this Court to review the conclusion of the Fifth Circuit that the obligation to pay those severance benefits had been transferred and that the six petitioners "were not entitled to a double-recovery windfall." Pet. App. at A-18 and A-32.

II. THE FIFTH CIRCUIT'S DECISION THAT AN AWARD OF ATTORNEY'S FEES AND COSTS RELATING TO PETITIONERS' APPEAL TO THE COURT OF APPEALS WAS "UNWARRANTED" WAS NOT AN ABUSE OF DISCRETION AND DOES NOT WARRANT REVIEW BY THIS COURT

The traditional American rule is that each party to litigation pays his own attorney's fees. It is the exception where a court orders one party to pay the attorney's fees of the other. Under ERISA, Congress specifically left it to the discretion of the court whether an exception to the

prevailing American rule should be made.[5] Surely, no such exception should be made where, as here, there was a "near-equivalence of merit in the parties' positions" and an "absence of any culpability or bad faith." Pet. App. at A-35. *A fortiori*, the instant case is not an appropriate case for this Court to review this conclusion as an abuse of discretion. Indeed, respondents submit that it would have been an abuse of discretion if the Court below had awarded attorney's fees to petitioners.

Furthermore, the Court of Appeals, after careful consideration, exercised its discretion and concluded that such an award to petitioners relating to the appellate phase of the litigation was "unwarranted." Pet. App. at A-36. The Court of Appeals came to this conclusion in the context of its findings (1) that petitioners sought to benefit themselves rather than "all participants and beneficiaries of the instant plan," (2) that petitioners had not "resolved a significant legal question regarding ERISA," (3) that there was an "absence of any culpability or bad faith" on the part of the respondents, and (4) that there was a "closeness of the legal issues presented—with the concomitant near-equivalence of merit in the parties' positions." Pet. App. at A-35.

The Fifth Circuit used the five factor test, originated in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), in determining whether to award attorney's fees in ERISA cases. The basic five factors considered by the Fifth Circuit in the instant case in the exercise of its discretion are the same factors that are used by each of the other courts of appeals.[6] Thus, there is no conflict among the

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[5] Section 502(g)(1) of ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

[6] *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986); *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan*, 698 F.2d 593, 602 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Ursic v. Bethlehem*

courts of appeals on the basic elements to consider in connection with attorney's fees requests—despite petitioners' assertion to the contrary.[7] That the application of the basic test by the courts of appeals to different cases with different facts has resulted in some differences of emphasis and analysis does not rise to the level of a conflict among the circuits.[8]

Petitioners repeatedly argue that "[f]ee awards to prevailing plaintiffs have long been the rule under the Civil Rights Act of 1964 and the Civil Rights Attorneys' Fees Act of 1976" [sic] and that "[t]hese statutes contain the exact discretionary fee language found in ERISA." Pet. at 16 and 24.[9] Whether by reason of negligence or

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Mines, 719 F.2d 670, 672-73 (3d Cir. 1983); *Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017 (4th Cir. 1993); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397 (7th Cir. 1992); *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652 (8th Cir. 1991); *McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521 (9th Cir. 1985); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192 (10th Cir. 1992); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116 (11th Cir. 1993); *Lucas v. Teamsters Local 639 Pension Trust*, 2 Employee Benefits Cas. (BNA) 1998 (D.D.C. 1981).

[7] Petitioners argue that the denial of attorney's fees by the Court below conflicts with *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397 (7th Cir. 1992). Pet. at 20. There is no such conflict. In *Roadmaster*, the Seventh Circuit specifically found that "it is clear the defendants' [Roadmaster's] litigating position in the district court was not substantially justified," *id.* at 1405, whereas in the instant case, the Fifth Circuit found "near-equivalence of merit in the parties' positions." Pet. App. at A-35.

[8] See *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992), where the Seventh Circuit conceded that it had used different tests, but that the difference between them was "insubstantial."

[9] Citations to the petition for writ of certiorari are referred to as "Pet. at ——."

otherwise, the latter above-quoted statement of petitioners is not an accurate representation to this Court.

In both the Civil Rights Act of 1964 [10] and the Civil Rights Attorney's Fees Awards Act of 1976,[11] Congress specifically authorized an attorney's fee award to "the prevailing party." In ERISA, Congress pointedly did not do so; it authorized an attorney's fee to "either party." If Congress had intended that the prevailing party policy be applied under ERISA, Congress knew exactly how to do so—and it chose not to do so.

It is noteworthy that two years after passage of ERISA, Congress revisited its authorizations for the award of attorney's fees when it enacted the Civil Rights Attorney's Fees Awards Act of 1976. Though Congress noted that it had authorized fee shifting in "more than 50 laws," Congress chose to expand its authorizations in 1976 only with regard to civil rights actions. Thus, the Civil Rights Attorney's Fees Awards Act of 1976 "is limited to cases arising under our civil rights laws, a category of cases in which attorney's fees have been traditionally regarded as appropriate." S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976). The enactment of the 1976 Act was in response to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), wherein this Court "ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory." S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976). Congress has chosen not to specify awards to a "prevailing party" under ERISA and has not indicated in any way that it has specified ERISA as a law which it deems "important enough to merit fee shifting under the 'private attorney general' theory." *Id.*

Petitioners cite this Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), in support of their position on attorney's fees. Pet. at 23.

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[10] 42 U.S.C. §§ 2000e-2000e-17.

[11] 42 U.S.C. § 1988 *et seq.*

The *Newman* case not only does not support petitioners' position; that case plainly shows the lack of merit in petitioners' position. Petitioners assert that they have "acted as private attorneys general." Pet. at 24. Contrary to this assertion, however, in the instant case, the six individual petitioners have sought enhanced retirement benefits for themselves and have sought a "double recovery windfall" of severance benefits for themselves. Contrast those goals of the instant six petitioners with the petitioners in *Newman* who instituted a class action under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination. In *Newman*, this Court noted that:

> When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

Newman at 402.

Though vindication of personal rights under ERISA has been designated by Congress to be important, there is no evidence that Congress considers recovery of such benefits by individual participants as the equivalent in importance to a person who brings a racial discrimination action "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.*

In any event, petitioners were not the prevailing parties in the appeal to the Fifth Circuit, *i.e.*, petitioners failed to persuade the Fifth Circuit to change the judgment of the District Court. And the attorney's fee issue in the instant case related only to that appeal.[12] In this context, it is dis-

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[12] Subsequent to the filing of the petition in this Court, the District Court denied petitioners' application for attorney's fees relating to the proceedings before the District Court. *Jan Harms, et al. v. Cavenham Forest Industries Inc., et al.*, No. 87-4068, slip op. (E.D. La. 1993). *See* Appendix, *infra*, at 1a.

ingenuous for petitioners to say that they "have substantially prevailed." Pet. at 22.

There is no basis for applying the fee shifting rules of civil rights cases to petitioners. There is no basis for treating petitioners as private attorneys general. As this Court ruled in *Alyeska*, only Congress can specify which laws are important enough to merit fee shifting under the private attorney general theory. Congress did not so specify in ERISA.

CONCLUSION

Respondents respectfully submit that this Court should not grant a writ of certiorari in a routine case such as the instant one (1) to review the interpretation of private documents of interest to relatively few people, or (2) to review the exercise of discretion by the Court below which found that an award of attorney's fees to petitioners was "unwarranted." Pet. App. at A-36. Although petitioners' claims are under employee benefit plans, those claims relate to plan provisions dealing with an involuntary corporate takeover. Provisions such as these are found in an extremely small percentage of all employee benefit plans.

The Court below concluded that an award of attorney's fees to petitioners was "unwarranted" after application of the standard five-factor test and findings that there were a "near-equivalence of merit in the parties' positions" and an "absence of any culpability or bad faith." Pet. App. at A-35 and A-36. The courts of appeals have all adopted the same five-factor test for attorney's fees awards under ERISA that the Fifth Circuit used in this case. Moreover, the attorney's fees at issue here relate only to the appeal to the Court of Appeals, which appeal did not change the judgment of the District Court. In these circumstances, this case is an inappropriate one for this Court to review the allowance of attorney's fees under ERISA.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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